MOHAMAD MD. AMIN

v.

PENGERUSI LEMBAGA TATATERTIB PERKHIDMATAN AWAM & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[ORIGINATING MOTION NO. 25-28 OF 1989]
8 JUNE 1991

ADMINISTRATIVE LAW: *Order of certiorari - Dismissal - Void - Biased - Unreasonable - Extreme punishment - Breach of principles of natural justice.*

The applicant had been an employee of Arkib Negara Malaysia Cawangan Selatan since 2 May 1976.

On or about 27 October 1987 the 1st respondent informed the applicant of its intention to take disciplinary action against the applicant which might result in reduction of rank or dismissal from service for infringement of General Orders. Pursuant to Regulation 26 (Chapter D) of the said orders the applicant was accordingly informed of the charges and requested to forward his representations (if any) to vindicate himself.

On or about the 2 November 1987 the applicant answered the charges by letter to the 1st respondent.

On 22 November 1988 the applicant was informed of his failure to exculpate himself and subsequently dismissed from employment effective 19 November 1988. He was accordingly informed of his right to appeal within 14 days of the receipt.

Pursuant to a request by the applicant's solicitors for the relevent documents which led the 1st respondent to reach their decision, the 1st respondent on or about 20 February 1989 through Ketua Pengarah, Arkib, Negara Malaysia informed the said solicitors of their refusal to deliver the same and reveal the grounds of their decision.

On 22 April 1989 the 2nd respondent informed the applicant's solicitors that after due consideration of the appeal they were unable to reverse the 1st respondent's decision to dismiss the applicant on the following charges:

(i) Acting dishonestly and irresponsibly by using the duplicate key (said key) in his possession to gain entry into Arkib Negara Cawangan Selatan (said office) Tingkat 7, Wisma Persekutuan after office hours on 26 June 1986 between 12.51 p.m. and till 2.14 p.m. without informing his superiors.

(ii) Acting dishonestly and irresponsibly by retaining the said key till 28 June 1986 and using the same to enter the said office without prior information to and permission of his superiors in breach of reg. 31(e) - Arahan Keselamatan (Security Manual).

(iii) Acting dishonestly and irresponsibly by using the Xerox machine of the said office on 26 June 1986 between 12.51 p.m. and 2.14 p.m. for private purposes without prior knowledge or permission of his superiors.

The applicant pursuant to leave being granted to him, filed a Notice of Motion praying for order of *certiorari* to remove to the High Court to be quashed the decision of the 1st, 2nd and 3rd respondents made *vide* their letters dated 22 November 1988 of the 1st respondent and the 22 of April 1989 of the 2nd and 3rd respondents respectively.

The applicant's contention was that:

(i) The 1st respondent had resorted to extreme punishment without due consideration for other possible punishment.

(ii) The decision of the 1st respondent to dismiss him was preconceived and biased.

(iii) The decision to dismiss him was in breach of principles of natural justice as he was denied a fair hearing by the 1st and 2nd respondents by virtue of the fact that no formal enquiry was conducted. Thus the applicant was denied the opportunity to scrutinise evidence adduced and cross examine the relevant witnesses.

Held:

[1] The Court favoured the stand adopted by the 1st and 2nd respondents in respect of applicant's contentions (i) and (ii) in that they had complied with the procedure in Peraturan 26 of the Perintah-Perintah Am (Bab D) and acted within its powers in awarding the punishment they deemed justified.

The Court rejected the suggestion that the respondent was biased towards the applicant.

[2] In this instance the Court is of the view that it is only fair that having meted out the more extreme of the possible punishments at their option, the 1st and 2nd respondents inform the applicant of the grounds of his dismissal.

The Court agrees with the applicant's contentions that the 1st and 2nd respondents had breached the rules of natural justice.

[Application allowed.]

Case referred to:
Rohana bte Ariffin & Anor. v. Universiti Sains Malaysia [1989] 1 MLJ 487 ***(cit)***

Legislation referrred to:
Civil Law Act 1956, s. 3

Other sources referred to:
General Orders, Regulation 26 (Chapter D)
Arahan Keselamatan (Security Manual), Regulation 31(e)

For the applicant - Netto; M/s. Gana Muthusamy & Co.
For the respondent - Susila Param, SFC

JUDGMENT

Abu Mansor Ali J:

Pursuant to leave being granted to the applicant a notice of motion dated 10 May 1990 was filed by applicant praying for:

(1) an order of *certiorari* to remove to the High Court to be quashed the decisions of the Pengerusi Lembaga Tatatertib Perkhidmatan Awam (Kumpulan D), Pengerusi Lembaga Rayuan Tatatertib Perkhidmatan Awam (Kumpulan D) and Public Services Commission made *vide* their letters dated 22 November 1988 of the lst respondent and 22 April 1989 of the 2nd and 3rd respondents respectively.

The notice of motion was supported by the affidavit of the applicant Mohamad b. Md. Amin affirmed on 8 May 1990.

The facts of this case that led to the applicant making this application are as follows. The applicant had been employed as an Archives Attendant with the Arkib Negara Malaysia Cawangan Selatan since 2 May 1976.

On or about 27 October 1987 the 1st respondent wrote to the applicant that as he had conducted himself in such a manner as to infringe the general orders the 1st respondent was contemplating taking disciplinary action against him which might result in reducing the applicant in rank or his dismissal from service and pursuant to regulation 26 (chapter D) of the said orders the applicant was therefore informed of the charges and was accordingly asked to make his representations, if any to vindicate himself.

On or about 2 November 1987 the applicant wrote to the 1st respondent answering the charges.

On 22 November 1988 the applicant was duly informed that he had failed to exculpate himself. He was dismissed from his employment with effect from 9 November 1988. The applicant was also duly informed of his rights of appeal within 14 days of the receipt.

On or about 29 December 1988 the applicant's solicitors wrote to the 1st respondent requesting for copies of document stated therein including copies of all the documents used by the 1st respondent in reaching their decision to dismiss the applicant and the grounds thereof.

On or about 20 February 1989 the 1st respondent through Ketua Pengarah, Arkib Negara Malaysia replied to the applicant's solicitors refusing to deliver the said documents and refused to reveal the grounds of their decision.

Further on 22 April 1989 the Lembaga Rayuan Tatatertib (2nd respondent) wrote to the applicant's solicitors that after consideration of the grounds of appeal they were unable to reverse the 1st respondent's decision to dismiss the applicant.

The first ground raised by the applicant was that the decision to dismiss was void for unreasonableness in that no reasonable authority in possession of the facts as the 1st respondent and the 2nd respondent could have reached that said decision.

In Exh. "MMA1" the lst respondent's letter dated 27 October 1987 the applicant was charged with three charges. The first one was for using the duplicate key (said key) in the applicant's possession to open and enter the office of Arkib Negara Cawangan Selatan (said office) Tingkat 7, Wisma Persekutuan after office hours on 26 June 1986 between 12.51 p. m. till 2.14 p. m. without informing or without the permission of applicant's superiors and the charge is that he had acted dishonestly and acted irresponsibly.

The 2nd charge was the applicant was in possession of the key to the said office till 28 June 1986 3.30 p. m. and did use the said key to enter the said office without informing or without the permission of applicant's superiors thereby infringing Regulation 31(e) - Arahan Keselamatan (Security Manual). Hence applicant's conduct was said to be dishonest and irresponsible.

The third charge was for using the Xerox machine of the said office on 26 June 1986 between 12.51 p. m. till 2.14 p. m. for purposes to make copies of documents for private purpose without the prior knowledge or permission of applicant's superiors. Hence the applicant was by that conduct dishonest and had acted irresponsibly.

On these charges the applicant was found guilty and dismissed. The applicant's contention is that the 1st respondent had reporsed to extreme punishment without having considered other punishment for which applicant could be punished.

I find there is no merit in applicant's contention on this point. I agree with the respondents' Counsel's submission that the 1st respondent had followed the procedure in Peraturan 26 of the Perintah-Perintah Am (Bab D). It is settled law by virtue of s. 3 of the Civil Law Act since Peraturan 26 had been duly enacted the 1st respondent was following what was required of her under the law to come to a finding whether the punishment meted out to the applicant was a possible reduction in rank or dismissal. The lst respondent decided and duly issued the show cause letter. The 1st board decided that the explanation failed to exculpate. I find that the board was acting within its powers and awarded its punishment which the board felt justified to hand-out.

The second complaint of the applicant was the decision to dismiss him was in breach of the principles of natural justice as both the 1st and 2nd respondent failed to accord the applicant a fair hearing in that no formal enquiry was conducted thus preventing applicant from cross-examining all the relevant witnesses. The applicant was also not aware that certain evidence will be taken into account in particular the letter dated 25 August 1986 written by the applicant to the Pengarah, Arkib Negara Malaysia. By Exh. "MMA5" letter of Ketua Pengarah, Arkib Negara dated the 20 February 1989, letter dated 25 August 1986 (MMA8) from the applicant to Tuan Pengarah, Arkib Negara was referred to the Lembaga.

I also find that there is no merit in the complaint of the applicant that the contents of this letter "MMA8" was not brought to the attention of the applicant to enable the applicant to reply and the applicant was unaware that the contents of "MM8" could be taken into consideration as was revealed by letter "MMA5". I am also rejecting the suggestion that the respondent was biased towards the applicant as a result of "MMA8".

The affidavit of Ketua Pengarah Arkib Negara affirmed in encl. (12) para. 7 thereof set the record straight. The letter dated 25 August 1986 was referred to by the Lembaga because the applicant himself had referred to that letter "MMA-8" and had attached it to the written representation dated 2 November1987 when he explained the third charge against him.

The next complaint of the applicant was that the decision of the Lembaga to dismiss the applicant was preconceived and biased and therefore null and void.

The argument of Counsel for the applicant was when the 1st respondent's letter said,

> Lembaga Tatatertib telah menimbangkan segala maklumat yang telah diterima berpendapat bahawa tuan patut dikenakan tindakan tatatertib dengan tujuan turun pangkat atau buang kerja ...

and when the Lembaga proceeded to dismiss the applicant it had already preconceived the punishment it was to mete out. The Lembaga had not formulated any reason why it came to that decision to dismiss the applicant. The applicant cited the case of *Rohana bte. Ariffin & Anor. v. Universiti Sains Malaysia* [1989] 1 MLJ 487 at 491 where at p. 497 my brother The Hon. Datuk Edgar Joseph Jr. J quoted Lord Denning in *Breen's* case, at p. 191:

> If a man seeks a privilege to which he has no particular claim such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149. But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard.

In a similar manner as in Rohana's case in "MMA4" attached to encl. (10) the applicant's Counsel wrote to the Lembaga intimating the applicant intended filing an appeal and in "MMAa" the Counsel asked for documents used in the disciplinary proceedings and the

grounds of decision of the to enable him to proceed. In "MMA5" the 1st respondent refused to give the things asked for including the reason for the said decision. The reason given was the information sought for was 'classified'.

With respect I echo what has been stated by The Hon. Datuk Edgar Joseph Jr. J at (p. 497) in *Rohana's* case that in certain circumstances, a reasoned decision can be an additional and an essential constituent of the concept of fairness so that the applicant could be informed on what ground he had been dismissed. In our present case, in my view, it is even more required as the punishment that had been meted out against the applicant had been dismissal the heavier of the possible punishments. Our sense of fair play and justice and the decided cases demand the reasons the 1st respondent acted on to merit the severe punishment of dismissal. I am of the view the applicant therefore succeeds in showing that the 1st respondent had breached the rule of natural justice and the same applies to the 2nd respondent in confirming this decision.

I do not propose to deal with the other remaining grounds as the ones already dealt with are sufficient in my disposing of this motion.

For reasons given I allow the application in terms of the motion for *certiorari* and order the removal of the records for the purpose of having the said decision quashed.

Also found at [1992] 2 CLJ 1047